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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, EX REL.,
MOULDING-BROWNELL CORPORATION, ET AL.,
Appellees.

BRIEF FOR APPELLANT.

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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Appellees.

BRIEF FOR APPELLANT.

MAY IT PLEASE THE COURT:

This case comes to this Court on appeal from a decision of the Supreme Court of the State of Illinois, which decision affirmed an order of the Circuit Court of Cook County, Illinois, upholding an order of the Illinois Commerce Commission (hereinafter called the "Commission"). The order of the Commission, entered in two proceedings before it, requires appellant to assume the future expense of maintaining a certain switch track located in the City of Chicago and connected with the main line of the appellant, which switch track was not constructed by appellant, or at its expense, is not located upon property owned by appellant and is not owned by appellant.

1. Reference to Official Report of Opinions Delivered in the Courts Below.

The opinion of the Supreme Court of Illinois in this case is officially reported at 368 Ill. 584, 15 N. E. (2nd) 508, and appears in the printed record at pages 129 to 132, inclusive. That court made no findings of fact and stated no conclusions of law additional to those contained in its opinion. The opinion was handed down on April 20, 1938, and on June 15, 1938, that court denied appellant's petition for rehearing (R. 134). The Circuit Court of Cook County wrote no opinion in the case, confining itself to the entry of an order sustaining the order of the Commission (R. 126).

The two cases before the Commission, which were consolidated by it, were entitled *In the Matter of the Petition of The Alton Railroad Company for an Order authorizing the Abandonment and Discontinuance of Service by it over a switch track serving various industries in Chicago, Illinois,* Docket No. 24391, and *Moulding-Brownell Corporation* v. *The Alton Railroad Company,* Docket No. 22201. The report and order of the Commission, sustained by the Illinois courts and here involved, was made on March 24, 1937, is reported in Vol. 16 of the Illinois Commerce Commission Reports, at page 857, and appears in the printed record at pages 2 to 34.

2. Statement of the Case.

One proceeding before the Commission was initiated by a petition filed with the Commission on February 13, 1934, under its Docket No. 22201, by the Moulding-Brownell Corporation (hereinafter called "Moulding-Brownell") and E. Heldmaier, Inc. (hereinafter called "Heldmaier") in which petition appellant was named as a defendant (R. 36, *et*

seq.). In this petition it was alleged in substance that the petitioners were served by a switch track connected with appellant's line; that appellant had threatened to discontinue the payment of certain ordinance fees, charged by the City of Chicago for the maintenance of the track over public streets and alleys, unless it was reimbursed therefor, and would thereby lose the right to operate over the track; that Moulding-Brownell and Heldmaier would thus be deprived of service and would lose their investments in their plants.

This petition further alleged appellant's obligation to make the payments necessary to properly maintain the track and prayed for an order commanding appellant not to abandon the track and requiring it to continue transportation service thereover. No answer to this petition was filed. Hearings upon the petition were had by the Commission, and the record closed before it (R. 51).

Before any decision was announced in that case, appellant filed its petition with the Commission on March 11, 1936, under the Commission's Docket No. 24391. In this petition (R. 52, *et seq.*) it was alleged, in substance, that appellant and its predecessors had operated over the switch track involved for many years, under contract, for the purpose of serving the Peoples Gas Light & Coke Company (hereinafter called the "Gas Company"), the Commonwealth-Edison Company (hereinafter called the "Edison Company"), Heldmaier and Moulding-Brownell; that from 1903 to 1923 the fees fixed by the ordinances of the City of Chicago, for the maintenance of the track across public streets and alleys, had been paid by those industries, but that from 1923 to the date of the petition, all license fees and costs of maintaining the track had been paid by appellant and its predecessors under a promise of adjustment by the industries.

It was further alleged that no such adjustment had been

made; that appellant had, therefore, cancelled the contract under which it had operated the track, and would make no further payments to the City of Chicago; that it did not own the track or the premises upon which the track was located, and was under no legal obligation to continue to make any further expenditures for maintenance of the track or in payment of any license fees. This petition further alleged an unlawful discrimination in any requirement that appellant continue to make such expenditures, and prayed an order requiring the industries to pay the future costs of maintaining the track and all fees exacted by the City of Chicago for its occupancy of public streets and alleys, and that in default of such payments, appellant be authorized to discontinue service over the track and cancel its rates on traffic to and from the industries served thereby. No answer was filed to this petition.

Hearings on the latter petition were had before the Commission, at which time a motion was made that the case made by the petition of appellant be consolidated with the case made by the petition of Moulding-Brownell (R. 56). After the hearings on the petition filed by appellant were completed and the case submitted, the Commission on October 29, 1936 entered an order in the two cases consolidated (R. 109). On November 28, 1936 appellant filed with the Commission a petition for rehearing in the consolidated cases, which was granted on December 9, 1936 (R. 109).

Additional evidence was then introduced (R. 110, *et seq.*), and on March 24, 1937 the Commission made a second order in the consolidated cases, which order rescinded the prior order of October 28, 1936. The order dated March 24, 1937 (R. 2, *et seq.*) is the one involved in this case. No petition for rehearing was filed by appellant after the order of March 24, 1937, was entered, as the Illinois statute (Ill. Rev. Stat. Ch. 111⅔, Sec. 71) only permits one rehearing in any case before the Commission.

There is little dispute in the facts developed before the Commission. Those facts are that appellant is the assignee of the purchasers at judicial sale of the railways and properties of The Chicago and Alton Railroad Company (hereinafter called the "Consolidated Company") (R. 77). The Consolidated Company was formed in 1906 by the consolidation of the old Chicago and Alton Railroad Company (hereinafter called the "Railroad Company") and the Chicago and Alton Railway Company (hereinafter called the "Railway Company") (See Pet. Ex. 20, R. 107). Receivers for the Consolidated Company were appointed on August 30, 1922, by the District Court of the United States for the Northern District of Illinois, Eastern Division, and the property remained in receivership until July 18, 1931, when appellant took over its ownership and operation (R. 77).

The entire switch track here involved, together with the spur tracks leading from it, as they now exist, are shown in yellow and white lines upon Petitioner's Exhibit 1, a map attached to the petition filed by appellant with the Commission in its Docket No. 24391 (R. 57). This map is reproduced facing page 59 of the record in this Court. The part of the track particularly involved is shown in yellow on the map, and lies between appellant's right-of-way line and the west side of Loomis street. It is 2681 feet in length.

The Gas Company has always maintained that portion of the track shown in yellow and lying west of the west side of Loomis street, since that portion of the track is owned by it and lies within its plant (R. 87, 120). Moulding-Brownell and its predecessor, the American Sand and Gravel Company, own and have always paid for the maintenance of the two spur tracks shown in white and serving Moulding-Brownell (R. 69), under provisions of the agreements relating to these spurs (Pet. Ex. 9, R. 102; Pet. Ex. 12, R. 104). Although no agreement covering the construc-

tion and maintenance of the spur serving Heldmaier could be found (R. 90), that company owns and has always paid for the maintenance of the spur shown in white and serving its property (R. 69). Appellant owns and concedes its obligation to maintain that portion of the track shown in yellow and lying within the limits of its right of way (R. 69).

It is not known when the construction of the track was started, but certainly it was prior to 1884 (R. 59). Since then it has been extended to the west and spur tracks have been constructed extending from it and serving various industries. The industries now served are the Gas Company, Moulding-Brownell, which is the successor of the American Sand and Gravel Company, Heldmaier, and the Edison Company, which is the successor of the Commonwealth Electric Company (R. 57, 59). By 1885 the track had been constructed across Hickory (Hillock) Street to Lot 3 in Blocks 3 and 4 and extended west from that point north of and parallel to Cologne Street to Loomis Street, which was then known as Deering Street (R. 60). In 1887 it was extended across Loomis Street into a plant of the Gas Company, which was located immediately west of Loomis Street (R. 71).

The spur serving Heldmaier was apparently constructed in 1894 (R. 61), but no agreement could be located under which this construction was carried out (R. 90). Under agreement dated November 15, 1900, between the Railway Company and the Gas Company (Pet. Ex. 2; R. 97), the track was extended from Lot 3 in Blocks 7, 8 and 9, where it then ended, across Lots 4, 5 and 6 in the same block to its present terminus (R. 64). On November 2, 1903 an ordinance (Pet. Ex. 3; R. 97-99) was passed by the City Council of Chicago requiring the elevation of a portion of the track, and thereafter, in accordance with the requirements of that ordinance, the track was elevated across Stark

Street, Mary Street and Hillock (Hickory) Street and two intervening alleys (R. 64, 76).

This work was done at the expense of the industries under an agreement (Pet. Ex. 4; R. 99) dated November 1, 1904, between the Railway Company, the Gas Company and the Commonwealth Electric Company, predecessor of the Edison Company (R. 64). This agreement provided for the assignment of the 1903 ordinance to the Gas Company and the Electric Company, reciting that that ordinance was secured for their benefit, and this assignment was made (Pet. Ex. 6; R. 101). In 1924 (R. 66) and 1932 (R. 67) the two spurs now serving Moulding-Brownell were constructed, the work being done under an agreement of April 5, 1924 (Pet. Ex. 9; R. 102) between the Receivers of the Consolidated Company and the American Sand and Gravel Company, and under an agreement of April 7, 1932 (Pet. Ex. 12; R. 104) between appellant and Moulding-Brownell. As a matter of fact, the agreement of April 7, 1932 was never executed by appellant.

No evidence was available as to who maintained this track prior to November 1 1904. From that date to March 26, 1936, appellant and its predecessors in interest have operated over the track and borne all the cost of maintaining that portion of the track shown in yellow on Petitioner's Exhibit 1 extending from Stark Street, where it joins the main line of appellant, up to the west side of Loomis Street (R. 69). This expenditure was assumed by appellant and its predecessors under the agreement dated November 1, 1904, between the Railway Company, the Gas Company and the Commonwealth Electric Company (Pet. Ex. 4; R. 99), the operation over the track by appellant and its predecessors being authorized by the same agreement (R. 72, 100). The term of that agreement was fixed in paragraph 3 thereof at five years, and thereafter until terminated. On March

26, 1936, appellant filed in the District Court of the United States in Chicago, its election not to assume the contract (R. 67; see Pet. Ex. 15; R. 105).

The right to make this election was conferred upon appellant by the Final Decree entered in the receivership proceedings involving the Consolidated Company (Pet. Ex. 20; R. 105). Since March 26, 1936, appellant has continued to operate over the track and maintain all that portion of it shown in yellow upon Petitioner's Exhibit 1, and extending from the connection with appellant's line to the west side of Loomis Street, pending a final decision in this case (R. 69).

The 1903 ordinance (Pet. Ex. 3; R. 97-99) expired on November 2, 1923. During the life of this ordinance, the $300 annual fee fixed by Section 4 thereof was paid by the Gas Company (R. 77), pursuant to the provisions of the agreement of November 1, 1904 (Pet. Ex. 4; R. 99). Upon the expiration of the ordinance of 1923, an argument thereupon arose between the Receivers of the Consolidated Company on one hand, and the Gas Company and the Edison Company on the other, as to the payment of the future costs of maintaining the track (R. 78, 79), the Receivers insisting that the industries should thereafter pay this cost, and also any charges fixed by future ordinances of the City of Chicago. While this discussion was in progress, the City of Chicago, on December 10, 1924, passed another ordinance (R. 66; see Pet. Ex. 11, R. 103), authorizing the continued maintenance of the track across public streets and alleys for twenty years from November 2, 1923, but increasing the fee to $1400.00 a year, and requiring the execution and posting with the City of a bond for $10,000.00 to insure compliance with the requirements of the ordinance.

Within the time allowed by Section 8 of the 1924 ordinance, the Receivers filed an acceptance thereof (R. 82)

upon an understanding with representatives of the Gas Company and the Edison Company that the charge made by the City under that ordinance would be paid by those companies and that the whole matter would be adjusted (R. 82; 83). Notwithstanding this understanding, no adjustment was made, and the Receivers posted the bond required by the 1924 ordinance. From November 2, 1923 to November 2, 1936, they and appellant maintained this bond at a cost of $10.00 per year premium thereon (R. 77, 78).

The Receivers and appellant also paid $1400.00 per year under the 1924 ordinance for the period from November 2, 1923 to November 2, 1932 (R. 77). The Gas Company refunded to the Receivers $300.00 in each of the years 1923, 1924 and 1925 (R. 78), but except for this reimbursement, the entire expenditure has been borne by the Receivers and appellant. On May 9, 1934, by an amendment (Pet. Ex. 14; R. 104) to the 1924 ordinance, the City of Chicago reduced the $1400.00 annual charge to $700.00 per year, beginning November 2, 1932 (R. 67), and appellant paid this amount up to November 2, 1936 (R. 78).

Thus, since November 2, 1923, appellant and its predecessors, in addition to maintaining that part of the track lying east of the west side of Loomis Street, as shown in yellow on the map (R. 69) have paid $15,190.00 to the City of Chicago as compensation for its occupancy of public streets and alleys. In addition, they have, through error, paid taxes on that part of the track here involved (R. 81). No taxes were paid by appellant on the real estate under the track (R. 82), and when the error was discovered, the track itself was eliminated from appellant's tax return (R. 81). As of November 2, 1936, appellant cancelled the $10,000.00 bond on file with the City of Chicago, and since that date has not paid the premium on the bond and has not paid the $700.00 per year charge fixed by the amendment of 1934 to the ordinance of 1924 (R. 110).

It was not possible to segregate the expense incurred by appellant in past years in maintaining the track involved, but for the three years following the hearing before the Commission, the average cost of maintaining that portion of the track here involved will be approximately $4,000.00 a year, and thereafter this expense will amount to about $1,000.00 per year (R. 68, 69). The figures are shown on Petitioner's Exhibit 18 (R. 106), and were not a guess, but were based on the witness's knowledge and experience as an engineer (R. 74). The rather high cost of maintenance is due to the elevation of the track from the point where it leaves appellant's line across Stark Street, Mary Street, Hillock Street and intervening alleys to Throop Street (R. 73).

There can be no doubt that the portion of the track here involved, the spur tracks extending from it and the right-of-way, upon which all those tracks are laid, do not belong to appellant and have never belonged to it. The portion of track shown in yellow on the map and outside appellant's right-of-way, was constructed at the expense of the Gas Company, and the testimony of that company's witness is that it now belongs to the Gas Company (R. 87), which also owns and maintains the portion lying west of the west side of Loomis Street. The ownership of the spurs, extending from the track and shown in white lines on Exhibit 1, is determined by the various agreements relating to the construction of those spurs, but it is clear that neither the spurs, nor the premises upon which they are laid, belong to appellant. These spurs belong to the industries they serve and are maintained by those industries.

Twelve maps of the line of appellant and its predecessors in interest, dated from 1884 to 1904, were produced upon the hearings before the Commission. At the time these maps were made. the uniform practice was to show tracks

owned by appellant and its predecessors in red; tracks owned by others being shown in blue (R. 59). On all of the maps produced, this track, as it existed at the date of each map, was shown in blue (R. 59, 62). The original roadmaster's book of appellant and its predecessors (Resp. Ex. 1; R. 108) also lists all of this track lying outside the right-of-way of appellant and its predecessors in interest, as being track owned by the industries (R. 62, 63).

The 1903 ordinance of the City of Chicago (Pet. Ex. 3; R. 97) recites that the track is built on private property, except where it intersects public streets and alleys, and requires the projected elevation to be of a character agreeable to the owners of the property upon which the track was then located. The agreement of November 1, 1904, between the Railway Company, the Gas Company and the Commonwealth Electric Company (Pet. Ex. 4; R. 99) also recites that the Electric Company and the Gas Company are the owners of nearly all the land upon which the track is located, and the Gas Company is required to secure the consent of the owners of the other property to the elevation and operation of the track.

The uniform practice of appellant in all cases of switch track constructed by industries. owned by them and not located upon appellant's right-of-way, is to require such industries to maintain the track. The track here involved is the only instance where appellant has been required to maintain switch or other track not owned by it and not located upon its right-of-way (R. 70, 71). In some cases, industries are required to pay for the maintenance of switch tracks even though they are owned by appellant and are partly on its right-of-way, and in all cases where such tracks cross public streets, the industries secure such rights as may be necessary (R. 96). Examples of this situation are the switch tracks serving four competitors of Moulding-

Brownell in Chicago (R. 95, 96). The industries served by these tracks compete with Moulding-Brownell (R. 94), yet rest under the necessity of maintaining the tracks serving them, while Moulding-Brownell is free of such obligation.

At Chicago, Wann, Springfield, Carlinville and Coal City, Illinois, appellant has switch tracks comparable in length with the track here involved, each such track having spurs extending from the switch track into adjacent industries (R. 112). In none of these instances does appellant maintain any portion of such tracks not owned by it and not on its right-of-way. In some cases appellant does not even maintain track owned by it if such track is not on its right-of-way. In any event, appellant's expenditures for maintenance are confined to track owned by it and located on its right-of-way (R. 112, 117, 118). The tracks involved at the points named differ from the one here involved only in the respect that greater parts of them are owned by appellant and are located upon its right-of-way.

Appellant has a standard form of switch track agreement, which is generally used in connection with the construction and maintenance of switch track (R. 70), which form was introduced in evidence (R. 85; See Pet. Ex. 19; R. 106). Under this agreement, the industries served by a switch track supply the right-of-way therefor over their own property and that of third parties, and also pay for any maintenance or repair work done on the track by appellant. This has been a requirement since 1905 (R. 74). Appellant does not ordinarily construct a switch track for more than one industry. If another industry locates on a constructed track, the matter is adjusted as between the industries (R. 76).

In the case of the track here involved, when maintenance work is required on the portion now maintained by appellant, substantial amounts will be expended, which, under the accounting rules of the Interstate Commerce Commis-

sion, should be charged to additions and betterments. Such charges will be due to the use of heavier rail, creosoted timber and additional ballast, the cost thereof over the cost of replacing what is now in the track being considered as an addition to property (R. 110, 111). Such charge could only be made, however, if appellant owned the track. Since it does not, the charge cannot be made in this fashion, although it is proper.

All of the track here involved is required to serve the Gas Company, Moulding-Brownell and Heldmaier (R. 86, 92). The Edison Company does not now receive service over the track (R. 75). The estimated gross revenue of appellant on traffic handled over the track in 1934 was about $40,000.00, although no study was made to determine the net revenue (R. 80). The rates to the industries are on the Chicago basis and could be cancelled merely by eliminating the industries from the Directory of Industries (R. 83, 84). The Moulding-Brownell plant was said to be worth either $350,000.00 (R. 38, 40) or $100,000.00 (R. 91), and the Heldmaier plant to be worth about $50,000.00 (R. 38).

The estimated gross revenue said to have been received by appellant on traffic to and from Moulding-Brownell, as stated by that company, was $37,243.00 in 1933; $25,124.00 in 1934 and $26,612.00 in 1935 (Respondent's Ex. 2; R. 108), but these figures are only estimates (R. 93). Practically all of appellant's revenue, shown on that exhibit was switching revenue, appellant maintaining the track for the benefit of other carriers who get the line haul on traffic to and from Moulding-Brownell.

In its order of March 24, 1937 (R. 2, *et seq.*), the Commission finds the facts to be as we have stated them, there being no material controversy with respect thereto. In fact, the Commission assumed that the facts were as alleged by appellant in the petition filed by it in Docket 24391 (R.

12). In its discussion of the facts, the order states that appellant does not own the track involved or the real estate under it (R. 6, 12, 25) but it is said that the track is part of the railroad now owned by appellant (R. 17). It is further said that this track is not the kind of track ordinarily covered by appellant's standard switch track contract (R. 17); that it is more comparable to the five tracks in other cities as stated in the evidence, and that the maintenance of the track by appellant would cause no unlawful discrimination (R. 18).

Following this discussion, the order contains twenty-four findings (R. 24-33) recapitulating the evidence and finding, among other things, that, although the track involved was not constructed by and is not owned by appellant, and is not located upon land owned by appellant (R. 25), it is a public track and part of the railroad facilities of appellant (R. 32); that authority to abandon the track and discontinue the rendering of transportation thereover should be denied (R. 32); that appellant should be specifically ordered and directed to continue the maintenance and operation of the track (R. 32, 33); that public convenience and necessity require such maintenance and operation by appellant, and that the order of October 28, 1936, should be rescinded (R. 33).

It is then ordered (R. 33, 34) that authority to abandon the track involved and to discontinue the rendering of transportation by means thereof be specifically denied; that appellant be specifically ordered to continue the maintenance and operation of the track and the rendering of service thereon to industries served thereby; that the order made in the two cases on October 28, 1936, be rescinded, and that jurisdiction of the proceeding and of the parties thereto be retained for the purpose of taking any further action that might appear reasonable or necessary.

3. Proceedings in the Lower Courts.

Upon the making of the order of March 24, 1937, appellant served upon the Secretary of the Commission on April 13, 1937, its notice of appeal to the Circuit Court of Cook County, and filed this notice in the Circuit Court on April 14, 1937 (R. 1, 123). In response to this notice the Commission, on April 16, 1937, filed a certified copy of the order of March 24, 1937, in the Circuit Court (R. 1, 2), and on May 3, 1937, filed in the Circuit Court the certified record of the proceedings before the Commission (R. 35).

The case was thereafter argued and submitted in the Circuit Court, and on October 9, 1937, an order was entered therein affirming, without opinion, the order of the Commission made on March 24, 1937, in the two cases before it (R. 126). On the same date, appellant filed in the Circuit Court its motion for a new trial or rehearing (R. 125). This motion was denied on October 9, 1937, exceptions being saved by appellant to both the order affirming the order of the Commission and the order denying the motion for new trial or rehearing (R. 126).

A notice of appeal by appellant from the Circuit Court of Cook County to Supreme Court of Illinois was filed in the Circuit Court on October 26, 1937, bearing acknowledgment of service thereof on opposing counsel on October 25, 1937 (R. 126, 127). The foregoing procedure was in accordance with Illinois statute, which permits an appeal from the Commission to the Circuit Court of Cook County upon filing a notice thereof and a direct appeal from the Circuit Court to the Supreme Court of Illinois (Ill. Rev. Stat. 1937, Ch. 111⅔, Sec. 72, 73).

The case was thereafter briefed and submitted in the Supreme Court of Illinois, and on April 20, 1938, that court handed down its opinion affirming the judgment of

the Circuit Court of Cook County, sustaining the order of the Commission (R. 129, *et seq.*). In its opinion, the court said (R. 131):

> "The only issue before us is whether a railroad can be compelled by the Illinois Commerce Commission to maintain a switch track built by and upon the property of the industries served by the track."

This is not quite a complete statement of the issue which we present, as it does not state the non-ownership by appellant of the track here involved. Such non-ownership by appellant was an allegation of appellant's petition filed with the Commission, and a fact proven by the evidence and accepted by the Commission in making its decision. The Supreme Court of Illinois in deciding the issue presented, held that switch tracks of this type, although constructed and owned by industries and located upon property other than that of the railroad, nevertheless, when once built, become a main part of the line of the railroad with which they connect (R. 131), and that consequently, the railroad is under a legal obligation to expend its funds in the maintenance of such track.

The court further based its decision (R. 132) upon Section 50 of the Public Utilities Act of Illinois (Ill. Rev. Stat., Ch. 111⅔, Sec. 50), which authorizes the Commission to require such additions, extensions, repairs or improvements to existing plants of public utilities as the Commission, in its judgment, thinks should be made. This section of the law, however, was not mentioned in the complaint filed by Moulding-Brownell and Heldmaier with the Commission, nor relied upon by the Commission in its order of March 24, 1937.

The court also made some errors of fact in its opinion. The agreement of 1904 (Pet. Ex. 4, R. 99) was not made by appellant, as stated in the opinion (R. 130), but by the Railway Company. Nor was it entirely performed by appel-

lant as stated (R. 130) but in successive years by the Railway Company, its successor, the Consolidated Company, the Receivers of the Consolidated Company, and appellant. The agreement, moreover, was not terminated by the Receivers as stated (R. 130) but by appellant (R. 67, 105).

Appellant's petition for rehearing in the Supreme Court of Illinois was denied on June 15, 1938 (R. 134). On July 1, 1938, an order allowing appellant an appeal to this Court (R. 135), together with a citation directed to appellees were signed by the Chief Justice of the Supreme Court of Illinois, and on the same date appellant's petition for appeal (R. 134), the order allowing appeal (R. 135), appellant's assignment of errors (R. 136), and its statement of the basis upon which this Court has jurisdiction of the appeal were filed with the Clerk of the Supreme Court of Illinois. On July 2, 1938, notice of these proceedings and of appellees' rights under paragraph 3 of Rule 12 of the rules of this Court, together with copies of the documents, was served upon counsel for appellees, and was filed with the Clerk of the Supreme Court of Illinois (See R. 139). The bond on appeal was filed on July 7, 1938.

On July 8, 1938, the citation, with acknowledgment of service on July 7, 1938, was filed, and on July 14, 1938, appellees filed with the Clerk of the Supreme Court of Illinois their motion to dismiss this appeal or to affirm the decision of the Supreme Court of Illinois, together with their statement opposing the jurisdiction of this Court, and praying that this appeal be either dismissed or the judgment affirmed, upon the ground that the question presented is so unsubstantial and frivolous as to justify such action. On July 12, 1938, there was filed with the Clerk of the Supreme Court of Illinois a stipulation with respect to the transcript of record to be certified to this Court on this appeal (R. 138).

4. Proceedings in this Court.

The record herein was filed in this Court on July 29, 1938 and on August 3, 1938 appellant filed its statement of points to be relied upon and designation of parts of the record to be printed (R. 140). On August 3, 1938, appellant filed in this Court its brief in opposition to the motion of appellees to dismiss or affirm, and on October 10, 1938, this Court entered an order herein postponing further consideration of the jurisdiction of this Court and of the motion to dismiss or affirm to the hearing of the case on the merits.

SPECIFICATION OF ERROR.

Appellant makes the following specification of error:—

(1) The Supreme Court of Illinois erred in holding that the order of the Illinois Commerce Commission here in question, requiring appellant to expend its money in the maintenance of the switch track involved did not constitute a taking of appellant's property without due process of law, in violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States, and erred in upholding and sustaining said order and in failing to reverse the judgment of the Circuit Court of Cook County sustaining said order, and in failing to reverse and set aside said order.

SUMMARY OF ARGUMENT.

I.

The motion filed herein by appellees to dismiss the appeal or to affirm the judgment should be denied. The federal question presented for decision was urged in the lower courts and was passed upon by the Supreme Court of Illinois. It is substantial and deserves the full consideration of this Court, in that the decision appealed from unquestionably takes appellant's property, is the only decision holding as it does, and involves a question of general public interest which should be determined by this Court.

II.

There can be no doubt that the order of the Commission here involved operates to take the property of appellant, in that it requires a substantial continuing expenditure by appellant upon the track in question. Such a requirement can only be sustained under the Fourteenth Amendment to the Federal Constitution if it is a valid exercise of state power.

III.

The requirements of the order here involved can only be sustained if they are reasonable, do not impose upon appellant an obligation beyond its agreement to serve the public, and are necessary in the public interest. The order does not meet any of these requirements.

1. There is no common law or statutory authority for the requirement that appellant expend its funds in the future maintenance of the track here involved. Appellant could not have been required to construct that track. The track is not now owned by appellant and is not located upon its right-of-way. Such a requirement compels, in effect, an extension of appellant's line of railroad, and thus

requires of appellant something beyond its agreement and undertaking to serve the public. Under these circumstances the order is an invalid exercise of state authority and operates to take appellant's property in violation of its rights under the Fourteenth Amendment to the Federal Constitution.

2. The order of the Commission and the decision of the lower court are grounded upon the theory that the track here involved is a public track open to use by the general public, and that by reason thereof, it is a part of appellant's railroad to such an extent as to require appellant to sustain the burden of maintaining it. This is not so under the law and the facts. On the contrary, the law imposes substantial restrictions upon the use of this track by any member of the general public and the physical location of the track is such that it is not capable of use by the general public. If appellant now desired to construct the track it could not condemn a right of way therefor. Under these circumstances, the track cannot be said to be publ. and the order of the Commission is invalid, since it requi. expenditures by appellant for the private use and benefit of the appellee industries now served by the track.

3. While there are no judicial decisions directly in point on the obligation of a railroad to maintain a track under the circumstances presented in this case, there are a number of decisions dealing with various phases of the situation presented by the case at bar. A consideration of those decisions compels the conclusion that the order of the Commission is invalid, in that it requires appellant to maintain track not constructed or owned by it and not located on its right of way.

4. The record does not show whether appellant makes or loses money in operating the switch track here involved. But the point is not important. Appellant cannot, in any case, be required to expend its funds for the use and benefit of private parties, or to undertake obligations beyond its agreement and undertaking to serve the public.

ARGUMENT.

I.

The Motion of Appellees to Dismiss the Appeal Herein or to Affirm the Judgment of the Supreme Court of Illinois.

As we have said, appellees filed in the office of the Clerk of the Supreme Court of Illinois a motion to dismiss the appeal herein or to affirm the judgment of the Supreme Court of Illinois, this motion being based upon the specific ground that the questions on which the decision herein depends, are so unsubstantial as to need no further argument. Appellant filed its brief in opposition to this motion, and this Court has postponed further consideration of its jurisdiction and of the motion of appellees to the hearing on the merits.

There can be no doubt that the question of appellant's claim of right under the Fourteenth Amendment to the Federal Constitution was presented to the lower courts and considered by them. This is conceded in the statement of appellees opposing the jurisdiction of this Court, where it is said that our claim of jurisdiction in this Court rests upon our statement, made in the state courts, that the order of the Commission constitutes a taking of appellant's property without due process of law.

The claim was presented to the Circuit Court of Cook County by motion for rehearing or reargument (R. 125), this being the first opportunity under Illinois practice (Ill. Rev. Stat. 1937, Ch. 111-⅔, Sec. 72), for the presentation of the claim. It was also assigned as error in appellant's brief filed in the Supreme Court of Illinois, that being the procedure required by Rules 36 and 39 of that court. A

copy of that brief, certified by the Clerk of the Supreme Court of Illinois, is on file with the Clerk of this Court. The assignment, appearing at page 17 thereof, reads as follows:

> "The trial court erred in failing to find that the order of the Illinois Commerce Commission, made in its Dockets 22201 and 24391, on March 24, 1937, constituted a taking of appellant's property without due process of law, in violation of its rights under * * * the Fourteenth Amendment to the Constitution of the United States."

The lower court dealt with the claim by saying (R. 132) that the order of the Commission does not violate any provision of the State or Federal Constitutions.

The motion to dismiss or affirm first argues that by proceeding before the Commission, appellant waived its right to appeal to this Court. The argument was answered at pages 3 to 6, inclusive, of appellant's brief in opposition to the motion and is clearly without foundation. Appellant followed the procedure prescribed by state law (Ill. Rev. Stat. 1937, Ch. 111⅔, Sec. 49a), and was not required to assume the chance of liability which might have resulted from other action. *Wadley Southern R. Co.* v. *Georgia*, 235 U. S. 651.

Appellant's procedure was in accordance with the decisions of this Court, *W. & A. R. Co.* v. *Commission*, 267 U. S. 493, 496; *T. & P. R. Co.* v. *Gulf etc. R. Co.*, 270 U. S. 266, 279; *Piedmont etc. R. Co.* v. *Commission*, 286 U. S. 299; *Natural Gas etc. Co.* v. *Slattery*, 302 U. S. 300. In *Myers* v. *Bethlehem etc. Corp.*, 303 U. S. 41, it was sought to enjoin the National Labor Relations Board from holding a hearing, the claim being that irreparable injury would be inflicted on the plaintiff if such a hearing were held. This Court said, at pages 50 and 51:

> "The contention is at war with the long settled rule of judicial administration that no one is entitled to ju-

dicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In conformity with the rule thus stated, appellant exhausted its administrative remedy before the Commission, and also pursued all the rights accorded it by Illinois law. It only comes to this Court on a claim of denial, by state authority, of its rights under the Federal Constitution.

The claim of appellees that the questions presented herein by appellant are so unsubstantial as to need no further argument brings in question the entire merits of the case. It is true that this Court will decline jurisdiction whenever it appears that the constitutional question raised on appeal, or by writ of error, is not substantial in character. Such a question may be unsubstantial because of previous decisions, as in *Zucht* v. *King*, 260 U. S. 174, 176, or because the question is so wanting in merit as to be frivolous, as in *Pennsylvania Co.* v. *Donat*, 239 U. S. 50. It is also clear that in order to invoke the jurisdiction of this Court, the controversy must be a real and substantial one, deserving serious consideration, and something more than a mere assertion of a claim in respect to some constitutional right. *U. S. Fidelity Co.* v. *Oklahoma*, 250 U. S. 111, 112.

If, however, the federal question is one which requires analysis and exposition for its decision, it cannot be said to be frivolous, *Milheim* v. *Moffat Tunnel District*, 262 U. S. 710, 716, 717, and a motion to dismiss an appeal for want of a substantial federal question will be denied if this Court is unable to say that every question in the case is so utterly lacking in merit as to require dismissal for lack of substance. *Hamilton* v. *Regents*, 293 U. S. 245, 258. A determination of the motion of appellees to dismiss or affirm requires, therefore, some consideration of the merits of the questions presented herein for decision.

Those questions are discussed in this brief, and we sub-

mit the discussion demonstrates that the federal questions here involved are so substantial in character as to justify the full consideration of this Court, and the denial of the motion to dismiss or affirm. We have found no decision of any court sustaining the rule of law announced by the Commission and sustained by the lower court. That rule goes far beyond any prior decision of the Illinois courts. And the question for decision is one of substantial public interest, which should be decided by this Court.

II.

It Is Clear that the Order of the Commission Constitutes a Taking of Appellant's Property, and Can Only Be Justified If It Is a Valid Exercise of State Authority.

It may not be disputed that the order of the Commission does constitute a taking of appellant's property, in that the order requires appellant to expend its money in the maintenance of the track here involved. From November, 1903, to November, 1923, appellant did maintain the track at its expense, under agreement with the Edison Company and the Gas Company (Pet. Ex. 4, R. 99). Under that agreement appellant and its predecessors were compensated for their expenditures in maintaining the track through the assumption by the industries of the cost of elevation (R. 74), and by a grant of the exclusive right to operate over the track. From November, 1923, until March 24, 1937, the date of the Commission's order, appellant also maintained the track at its expense, but did this at first because of the pending negotiations with the industries (R. 77-80), and thereafter because of the Illinois law prohibiting a discontinuance of service, which would have been forced by a lack of maintenance, without a permissive order of the Commission (Ill. Rev. Stat. 1937, Ch. 111⅔, Sec. 49a). Since March 24, 1937, appellant has

been required to maintain the track by the order of the Commission.

The record is clear in showing that for the three years following the hearings before the Commission, appellant will be required to expend approximately $4,000.00 a year in maintenance, and that thereafter this expense will be approximately $1,000.00 a year (R. 68, 69, 73, 74). In addition, appellant may be required to pay the license fees fixed by ordinance of the City of Chicago for the maintenance of the track over public streets and alleys (Pet. Ex. 14, R. 104). The annual fee is $700 per year, and while the issue of appellant's obligation to make this payment subsequent to November 2, 1936, when appellant ceased paying (R. 78), was not determined by the Commission (R. 21) or by the Supreme Court of Illinois (R. 130), it is nevertheless clear that any such payments subsequently required to be made, will have to be made by appellant if the Commission's order is valid.

There must be some legal justification for this taking of appellant's property. Certainly, the right of ownership of railway property, which must include money, is entitled to the protection of constitutional guarantees. *Reagan* v. *Farmers Loan etc. Co.*, 154 U. S. 362, 399; *Mo. Pac. R. Co.* v. *Nebraska*, 164 U. S. 403, 417; *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540, 570; *Atlantic Coast Line R. Co.* v. *Commission*, 206 U. S. 1, 20; *Mo. Pac. R. Co.* v. *Nebraska*, 217 U. S. 196, 206; *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585, 595. In the *Railroad Commission* cases, 116 U. S. 307, a suit to enjoin the operation of a state statute regulating railroad rates, this Court said with respect to the powers of a state under the Fourteenth Amendment, page 331:

> "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a

> power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

While a state has the right to regulate the local affairs of railroads lying within its border, such right of regulation, no matter what form it takes, cannot be relied upon as a justification for a violation of a railroad's rights under the Federal Constitution. *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236; *C. M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, 501. Nor can confiscation be successfully disguised as regulation, *A. C. L. R. Co.* v. *Commission*, 206 U. S. 1, 20; and the public interest cannot be made to serve as an excuse for an invasion of constitutional rights. *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585, 595.

Missouri Pacific R. Co. v. *Nebraska*, 217 U. S. 196, is a case much like the case at bar. In that case the Railroad Company was required to build and maintain a side track to serve an elevator, the requirement being based upon a state statute. Recognizing the right of the state to require a railroad to do what was reasonably necessary to serve the public in the way in which it had undertaken to serve it, this Court, nevertheless, said at page 206:

> "But railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

In *I. C. C.* v. *Oregon etc. Co.* 288 U. S. 14, this Court said at page 41:

> "The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation."

The fact of the taking of appellant's property not being

open to question, it only remains to be seen whether such taking is justified under the law.

III.

The Order of the Commission Is Not a Valid Regulation Within the Limits of State Authority. It Imposes on Appellant Obligations Beyond Appellant's Agreement and Undertaking to Serve the Public, and Operates to Take Its Property Without Due Process of Law in Violation of Its Rights Under the Federal Constitution.

It is well settled that a state has power to make reasonable regulations with respect to the operation of railroads within its borders. This right has been recognized in many decisions of this Court to which it is unnecessary to refer. The question involved in each case is whether that power has been duly and properly exercised. *Wisconsin etc. R. Co.* v. *Jacobson*, 179 U. S. 287, 297. In *Oregon etc. R. Co.* v. *Fairchild*, 224 U. S. 510, it was said at page 524, that the propriety of a taking of railroad property under administrative regulation must

> "be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet."

In *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340, the Court quoted the *Fairchild* case, *supra*, with approval, and said at page 345:

> "The facts being established, the question then presented is whether, as a matter of law, they are adequate to support a finding of requisite public necessity—the mere declaration of a Commission is not conclusive."

In *Atchison etc. Ry. Co.* v. *Commission*, 283 U. S. 380, this Court at pages 394 and 395 mentioned many of its decisions applying the principle that a state, either directly

or through an authorized Commission, may require railroad companies to provide reasonable, adequate and suitable facilities for the convenience of its communities served by them. It was further said, however, at page 396:

> "The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one."

Having regard to this principle of law, we contend that the requirement made by the Commission in this case is essentially an unreasonable and arbitrary requirement, not supported by law; that it imposes upon appellant obligations beyond its undertaking to serve the public; and that it constitutes an unlawful taking of appellant's property, whether the taking be for public or private purposes. These claims require a consideration of a number of circumstances.

1. We direct attention to the fact that there is no provision of any Illinois statute relating to the maintenance of switch track constructed by a shipper off a railroad's right of way and owned by that shipper; that is to say, there is no statutory authority for the requirement of the Commission that appellant maintain the track here involved. This is an important consideration.

Appellant could not have been compelled to build the switch track here involved since that track lies beyond the limits of appellant's right of way. Certainly there has never been a common law obligation upon a railroad company to construct such a track. In *Terminal Railroad Assn. etc.* v. *Cain-Hurley Lbr. Co.*, 241 Ill. App. 364, a case very similar in its facts to the case at bar, the court said at page 369:

> "At common law there was no duty on the part of a railroad company, in a case of this character, to provide a switch track connection between its main line and the premises of a person or corporation desiring the same. *Vincent* v. *C. & A. R. Co.*, 49 Ill. 33;

People v. *C. & N. W. Ry. Co.*, 57 Ill. 436; 4 R. C. L. 680, 681; 33 Cyc. 124; *L. S. & M. S. R. Co.* v. *Hoffert*, 40 Ill. App. 631."

In *Wisconsin etc. R. Co.* v. *Jacobson*, 179 U. S. 287, there was involved the requirement of a Minnesota court that two railroads construct a physical connection between their lines at a point where the lines crossed, the requirement being made pursuant to the specific provisions of a Minnesota statute. This Court sustained the requirement as a valid exercise of state power, but took occasion to say at page 296:

> "At common law the courts would be without power to make such an order as was made in this case by the state court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind."

In *N. Y. C. R. Co.* v. *The Talisman*, 288 U. S. 239, this Court cited the *Jacobson* case, *supra*, and said with respect to the obligation of carriers to make track connections (p. 241):

> "Such carriers were not bound under the common law to make track connections."

In *Jones* v. *Newport etc. Co.*, 65 Fed. 7[illegible], it was claimed that a switch track connecting a railroad and a warehouse became, in the absence of a statutory provision, a part of the railroad; but the claim was rejected.

The Illinois statutes are equally explicit in relieving a railroad company of any obligation to construct such track. Section 5 of Article XIII of the Illinois Constitution of 1870 (Ill. Rev. Stat. 1937, page 59) reads as follows:

> "All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee or the elevator or public warehouse can be reached by any track owned, leased or used, or which can be used, by such railroad companies; and all rail-

road companies shall permit connections to be made with their track, so that any such consignee and any public warehouse, coal bank or coal yard, may be reached by the cars on said railroad."

This provision only requires a railroad company to give service over a track available for the purpose and to permit connections to be made with its track. It imposes no construction obligations upon railroads. Section 1 of an Act of June 14, 1909 (Ill. Rev. Stat. 1937, Ch. 114, Sec. 181) reads as follows.

"Any railroad being a common carrier of freight, upon application of any shipper tendering or receiving freight or merchandise in carload lots, shall construct, maintain and operate, upon reasonable terms, upon its own right of way at any regular station, a switch connection with any such shipper's railroad track which may be constructed to connect with its railroad upon its right of way, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient revenue business to such railroad company to justify the construction and maintenance of the same, and shall furnish cars for the movement of such traffic upon such switch upon its own rails to the best of its ability without discrimination in favor of or against any such shipper."

Under this provision, the maximum obligation cast upon a railroad is that of constructing, maintaining and operating a switch connection upon its own right of way. All other track referred to in the statute is to be constructed by a shipper who desires to secure service. The 1909 statute has never been specifically repealed, but Section 45 of the Public Utilities Act of Illinois (Ill. Rev. Stat. 1937, Ch. 111⅔, Sec. 45) deals with the same subject. (See appendix) This statutory provision requires a railroad company, under certain conditions, to make a connection between its main line and any track or tracks constructed by a corporation, person or municipal corporation, and further provides that under the conditions stated, the railroad shall

> "construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby."

In none of these constitutional or statutory provisions is there any language which even infers an obligation on an Illinois railroad to construct track off its right of way. On the contrary, it is plain that the only obligation cast upon a railroad is to construct a spur or connection upon its right of way to connect with tracks which are required to be constructed by shippers, if they desire service thereon. The two statutory provisions to which we have referred were considered in *Terminal Railroad Assn. etc.* v. *Cain-Hurley Lbr. Co.*, 241 Ill. App. 364. With respect to the 1909 statute, the court said at page 370:

> "An examination of this statute clearly discloses that the duty of building service tracks, imposed on railroad companies thereby, is limited to the construction of the same on their own property. It is not made the duty of a railroad company to construct service tracks for the benefit of others, beyond its own premises. This holding is supported by authorities in other States, where similar statutes have been under consideration." (Citing cases)

With respect to Section 45 of the Public Utilities Act of Illinois, the court said at page 372:

> "However, an examination of this statute will disclose that there is no provision therein requiring a railroad company to extend its lines beyond its own premises."

It was doubtless because of this situation that the track here involved was originally constructed and subsequently extended, in so far as it lies beyond the limits of appellant's right of way, at the expense of appellees. Appellant's contribution to that construction was, in conformity with Illinois law, limited to the construction of the 150 foot connection which lies upon its right of way.

We submit that there is no essential difference between

a requirement that switch track be built, and a requirement that a carrier maintain such track after it has been built by others. If the construction cannot be required, it would seem to follow that maintenance after construction cannot be required. Every argument making against appellant's obligation to build the track here involved, is equally effective in opposition to appellant's asserted obligation to maintain the track after construction. The only inference to be drawn from the common law and the constitutional and statutory provisions relating to such track is that the owner or the industries served thereby must maintain the track in such condition that service can be given. The lower court said, referring to our argument on this point (R. 131):

> "This argument is incompatible with our repeated holdings that switch tracks of this type, once built, become a part of the main line of the railroad, whether built upon private rights of way or upon public streets."

As we have said, there is no authority in the common law or in the Illinois statutes for this holding of the lower court. It is said to be based entirely upon what the same court is said to have held in prior decisions. This is not sufficient under the decision of this Court in *Wisconsin, etc., R. Co.* v. *Jacobson*, 179 U. S. 287, 296.

Moreover, it was only held in those decisions that such switch track becomes a part of the railroad with which it is connected for the purposes of public use and control. That is to say, it was only held that a railroad could be required to give service on such track, and that such service would be subject to public regulation with respect to rates and operation. In no decision prior to the one here involved has the lower court held that such track is so much a part of the railroad with which it connects that the railroad is obliged to assume all obligations of ownership, even though it does not own the track.

Decisions referred to by the lower court are those in *Truesdale* v. *Peoria etc. Co.*, 101 Ill. 561; *Chicago Dock Co.* v. *Garrity*, 115 Ill. 155; *C. & A. R. Co.* v. *Suffern*, 129 Ill. 274; *People* v. *Blocki*, 203 Ill. 363; *Commission* v. *L. E. & W. R. Co.*, 277 Ill. 574; *Commission* v. *C. C. C. & St. L. R. Co.*, 296 Ill. 513; *Commission* v. *Smith*, 298 Ill. 151; *St. L. S. & P. R. Co.* v. *Commission*, 309 Ill. 621; and *Von Oven* v. *C. B. & Q. R. Co.*, 317 Ill. 334. In almost all of these cases, the track involved was either laid in a public street, or was upon the railroad right of way and owned by the railroad. And in each it was only held that the track was part of the railroad and a public highway for purposes of service and public regulation.

That this has been the rule is demonstrated by appellant's practice in the past. The uniform practice of appellant has been to require industries owning switch track not on appellant's right of way, to maintain such track (R. 71). Five specific examples of track comparable to that here involved were cited, all of them being maintained by the shippers (R. 112). At no time in the past has appellant maintained track not owned by it and located on its right of way (R. 71), except under special agreement, and this is the first occasion when it has been required to do so. Appellant's standard form of switch track agreement (Pet. Ex. 19; R. 106) requires the industry to supply right of way for track and pay for maintenance.

It may be that switch track such as is here involved, when once constructed and open for use, is to be considered as part of the railroad with which it connects for the purposes of use and regulation; that is to say, that a railroad company may be required to give service over it so long as it is maintained in proper condition and that the rates charged for such transportation are subject to public regulation. But we do not present that question for decision.

In this case appellant has offered to continue the service to the appellee industries if they pay the cost of properly maintaining the track here involved in its present location (R. 55). But to say that such an obligation, if it is an obligation, may be expanded into additional obligations which appellant has only hitherto sustained with respect to its own track, goes beyond all reason.

The lower court attempted to support its conclusions by referring to Section 50 of the Illinois Public Utilities Act (Ill. Rev. Stat. 1937, Chap. 111⅔, Sec. 50), which confers upon the Commission authority to make an order requiring a railroad company to make such changes, repairs, etc. in its plant as may be necessary to promote the security or convenience of the public. But this section has no application to the case at bar. There is no claim that appellant has ever failed to properly maintain the track here involved or that service thereon has been refused. At present appellant is maintaining the track and giving service thereon, in compliance with the Commission's order.

The complaint filed before the Commission by the appellee industries did not ask for an order under Section 50, nor was that section dealt with in the order of the Commission, or assigned as a ground for the order. It is only imported into the case by the decision of the lower court, and cannot serve as a justification for that decision. *Oregon etc. Co.* v. *Fairchild*, 224 U. S. 510, 525, 526; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281, 282.

And there is a further consideration. A railroad company has certain more or less definite public obligations which are incident to and result from its engagement and undertaking to serve the public. While it may be required to fulfill such obligations as are incident to its engagement, it cannot be required to do more, and any regulation which requires it to do more is invalid. This rule has been ap-

plied many times by this Court, particularly in connection with requirements made under state authority.

Thus, in *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340, the Minnesota Railroad and Warehouse Commission had entered an order directing the railway company to erect a scale in its stock yard at a local point for the purpose of securing the weights on live stock shipped from that point. The order was sought to be sustained in this Court upon the theory that the State Commission had general authority to require the railroad to build and maintain such facilities as are necessary for the public needs. This Court, however, said at page 346:

> "The demands upon a carrier which lawfully may be made are limited by its duty, and the present record conclusively shows the required structure had no direct relation thereto."

Other decisions to the same effect are *Missouri Pacific Ry. Co.* v. *Nebraska,* 217 U. S. 196, 207; *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403; 417; *C. & N. W. R. Co.* v. *Ochs,* 249 U. S. 416, 420, 421; *A. T. & S. F. R. Co.* v. *Commission,* 160 Pac. (Cal.) 828; *Hollywood* v. *Commission,* 219 Pac. (Cal.) 983, 985.

An outstanding example of the application of this rule of law is the decision in *I. C. C.* v. *Oregon etc. R. Co.,* 288 U. S. 14. In that case the Interstate Commerce Commission had required the railroad company to build 185 miles of railroad into territory where it had not hitherto undertaken to render service. Referring to a number of previous decisions of this Court in which orders of various regulatory bodies were sustained, this Court said at page 33:

> "They were sustained, however, upon the express ground that the railroads had undertaken the service and must supply facilities adequate and reasonably necessary to its performance. The requirements were found not to involve the rendition of a new or differ-

ent service from that to which the owners had agreed when they dedicated their property to a public use. Where, however, the State's mandate involved the rendition of a service beyond the agreement of the carrier, the order was annulled."

The Court said further on the same point at pages 39 and 40:

"Wherever the State attempted to enforce a regulation or demand extension of facilities outside the company's undertaking to serve the public, the power was negatived for the very reason that the attempted exercise called on the railroad company for something beyond its agreement."

Applying the rule to the case at bar, it is clear that the Commission's order requires appellant to do more than it is required to do by virtue of its public undertaking. A railroad operating in Illinois has never before been required to expend its money in the maintenance of privately owned track, not on its right of way. The most that can be said of a railroad's undertaking under Illinois law is that it incurs an obligation to give service if track is constructed and maintained off its right of way by an industry desiring to be served, and is connected with the railway line. And so far as we know, there is no requirement under any other law that a railroad maintain track owned by a shipper and not on the railroad right of way. Every reasonable consideration supports the view that such a requirement goes far beyond the limit of a railroad's duty.

The obligation to supply the track necessary in furnishing service off a railroad right of way has always been the obligation of the industry desiring the service. As we have said, it seems only logical that an industry obliged to supply track in order to secure service should be required to maintain the track in proper condition at its own expense throughout the entire period that the service is desired. The construction of a switch track, the cost of which must

be assumed by a shipper, is but a preliminary step. It is wholly ineffective in so far as continuous service is concerned, unless the track thus constructed is maintained in such a condition that the service can be continued.

This conclusion is not affected by any possible obligation of a railroad to perform transportation over a shipper's track so long as the track is fit for service. An industry is compelled to construct the track before a railroad is obliged to give service thereon, but if no such track is ever constructed the service obligation never comes into existence. In the same way, it is only reasonable to conclude that a service obligation which does not come into existence until a shipper constructs the track, ceases when the track is permitted to become unfit for service, for the giving of service is just as completely prevented by a track not fit for service as by lack of a track.

The duty of maintaining railroad track is one which normally results from ownership of such track. The fallacy of a contrary view is demonstrated by consideration of an individual rail placed by appellant in the track here involved as a result of the Commission's order. The rail is purchased by appellant with its own money. It belongs to appellant at all times subsequent to its purchase up to the moment when it becomes necessary to place it in the track. Since the Gas Company retains its right of ownership in the track, and since the rail becomes an integral part of the track, the act of placing it therein automatically transfers its ownership from appellant to the Gas Company. This cannot be the law. No argument based upon public necessity or the duty of a railroad to the public generally could justify such results.

The facts in the case at bar are a complete justification for this reasoning. All of the piece of track here involved is used in giving service to each of the appellee industries,

for the reason that each of the particular tracks serving each industry is nothing more than a continuation of the piece here in issue. But each of the appellee industries concedes and discharges its obligation to maintain the particular track into its plant. Thus, the Gas Company maintains that piece of track shown in yellow on Petitioner's Exhibit 1 (R. 58) lying west of the west side of Loomis Street. Moulding-Brownell and Heldmaier each maintain the tracks shown in white on Petitioner's Exhibit 1 and serving their respective plants. Yet these tracks are nothing more than extensions of the piece of track here involved. It is difficult to understand how an obligation to maintain parts of the entire track can be distinguished from an obligation to maintain all of the track required to supply the service which the appellee industries insist upon having.

It seems plain that the order of the Commission, in addition to being without authority in the common and statute law, imposes upon appellant an obligation which goes beyond appellant's agreement to serve the public. With the exception of the decision here involved, there is no law in Illinois or elsewhere which obligates a railroad to do more than construct and maintain track owned by it and on its right of way. The requirement of the order really has the effect of requiring appellant to extend its line, and this is a requirement which, under the facts in this case, is not justified by any view of the law.

In the first place, neither the order of the Commission nor the decision of the lower court undertake to confer upon appellant ownership of that extended line. The non-ownership of the line by appellant is to continue as a fact. Expenditures made by appellant upon the track will continue to be made for the benefit of the owner thereof and the other industries served thereby. Such a conclusion is contrary to every idea of justice and equity.

In the second place, the extension of line is not, as we shall show, for a public purpose, but for the private use and benefit of the appellee industries. The fact is that the area served by this track is not open to public development. The track itself is not capable of use by any interest other than the appellee industries. The compelled extension of appellant's line is not for public purposes, but for the benefit of private parties.

The general rule is that a railroad cannot be required to extend its line in order to serve individual shippers or even the public generally, when such extension is not within its original undertaking to serve the public. *I. C. C.* v. *Oregon etc. Co.*, 288 U. S. 14, 33, 39, 40; *A. T. & S. F. R. Co.* v. *Commission*, 160 Pac. (Cal.) 828, 831; *Hollywood* v. *Commission*, 219 Pac. (Cal.) 983, 985. In this case, the extension of line required by the Commission's order is certainly not within appellant's agreement. In some cases, railroads have been required to extend their lines by virtue of statutes or otherwise. *W. M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287; *Union Lime Co.* v. *C. & N. W. R. Co.*, 233 U. S. 211, 222; *C. & N. W. R. Co.* v. *Ochs*, 249 U. S. 416, 420, 421; *L. E. & W. R. Co.* v. *Commission*, 249 U. S. 422, 425; *M. C. R. Co.* v. *Commission*, 236 U. S. 615; *S. A. L. R. Co.* v. *Commission*, 240 U. S 324. But in all such cases, the obligation was held to be within the original undertaking of the railroad. In no case has such a requirement been upheld in the absence of ownership of the extended line by the railroad, and of a public interest requiring the extension.

If the decision of the lower court is the law, a railroad is in constant danger of having its line automatically extended, so far as concerns the burdens of ownership, without its consent and in all directions. At the same time it will not own such extensions, will not have complete control over them, and in many cases, can be deprived of them

and of amounts spent on them, at the election of others. We submit that no theory of law or justice furnishes support for such conclusions.

It thus appears that there is no authority in law for the burden imposed upon appellant by the Commission's order. The only claimed authority therefor, as appears from the order and the decision of the lower court, consists of prior decisions of the lower court; and none of these decisions, when properly analyzed, constitute such authority. But even if they did support the conclusion reached by the lower court in the case at bar, they would add nothing to its validity. We submit that at least, there must be something in the statutes of Illinois or in the common law justifying the requirements of the order, if it is to be sustained. Since there is no such authority, it follows that there is no legal justification for the order and that it cannot be sustained.

2. In its order, the Commission said (R. 17) with reference to the track here involved:

> "It is therefore a part of the railroad now owned by the Alton and is a public highway open to public use. Its use is not limited to the industries which are now served by the industrial spur tracks which branch off therefrom, but any member of the public who can be served thereby is entitled to such service."

Following this discussion, the Commission found (R. 32):

> "That by reason of the matters hereinbefore set forth, the said spur track in question is a public track and part of the railroad facilities of the Alton Railroad Company."

Following this reasoning the Supreme Court of Illinois, discussing the argument presented to it by appellant, said with reference to that argument (R. 131):

> "It overlooks the fact that petitioning railroad uses this track for its own benefit to serve the industries

> located thereon, and, under the authorities above cited, may use the track, or extensions thereto, conveniently to serve other shippers and the public at large. The public, therefore, has an interest in the proper maintenance of this track quite apart from the interest of the parties to this suit."

It thus appears that the claimed public character of this track was an important ground for the conclusion reached both by the Commission and by the lower court. We submit that under the law and the facts, the track is not a public track and that this claimed justification for the decision of the lower court does not exist.

As we have said, the track here involved is wholly owned by the appellee industries except to the extent that it lies on appellant's right of way. The various spurs were constructed and are owned and maintained by the industries directly served thereby. The testimony was that the portion of the track shown in yellow on Petitioner's Exhibit 1 (R. 58), and lying off appellant's right of way was constructed and is owned by the Gas Company (R. 87). Except for the points at which the track crosses public streets and alleys, it lies on private property, almost all of which is owned by the appellee industries.

Under these circumstances, it is clear that the track is not a public track and open to indiscriminate use by the public at large in the same way as is a track owned by appellant and located upon its right of way. Section 45 of the Illinois Public Utility Act (See Appendix) provides that when a track has been constructed by a shipper and connected with a spur or connection constructed by a railroad, any corporation or person may use such track, but only subject to the conditions stated in the statute.

The law requires that any person desiring to use such track must pay a reasonable proportion of the cost thereof to the person paying for such track, such cost to be deter-

mined by the Commission. In addition, the right to such use is dependent upon whether the use will cause an unreasonable interference with the rights of the party incurring the original construction cost. It is thus plain that both the Commission and the lower court were wrong in concluding that in the case of the track here involved any person desiring to use it had that right. It is quite possible that many industries would desire to use this track and would be prevented from so doing by their inability to meet the conditions imposed by the statute.

No case cited in the opinion of the lower court supports the conclusion that the public now has any interest in the track here involved, or that it is impressed with a public character. In most of those cases, the tracks involved were to be constructed by the railroad on its property, at its expense, and were to be owned by it.

Certainly the appellee industries feel that they have a decided interest in this track by virtue of their ownership of it, and of the land upon which it lies. As appears from the report of the Commission (R. 22), the Edison Company claimed before the Commission that it should receive reasonable compensation for the use of its property occupied by the track. Presumably, such compensation should be paid by the owner of the track, since it is clear that under the law, the initial cost of constructing the track and of securing the land upon which it is placed was required to be paid by someone other than appellant.

There are numerous distinctions between the track here involved, and a track open to indiscriminate use by the public, such as a track owned by appellant and located upon its right of way. Thus, appellant could not impose, with respect to its owned track, the limitations imposed by statute upon the use of the track here involved by others than the appellee industries.

Appellant could not use this track for its general railroad purposes. It could not, for example, erect a freight house adjacent to it and use the track for the purpose of serving such a freight house. It could not use the track as a public delivery track through which any shipper or receiver could get service. But track which it owned would be available for all such uses.

Appellant has complete control over track owned by it, but only has such control over the track here involved as is required by its operation thereon and its maintenance thereof. That is to say, appellant has that control which is necessary to enable it to make the track safe and available for operation. But appellant's control stops at that point. Having no right of ownership in the track, it could not, for example, relocate it, even though proper railroading might dictate such a course.

The order of the Commission requires appellant to expend substantial amounts in maintaining the track, a part of which expenditures would, as found by the Commission (R. 31, 32), be chargeable to capital account under the rules of the Interstate Commerce Commission if appellant owned the track. But appellant cannot make the charge to that account under the circumstances, and is thus deprived of the right to earn any return upon amounts thus expended.

The owner of the track, which we must assume is the Gas Company (R. 87), presumably has the right to remove the track at any time it wishes. Even if it be thought that the other industries now served by the track have some rights in its continued operation, notwithstanding their lack of ownership, it would still seem such industries, by agreement, could provide for the removal of the track, and that appellant could make no valid objection thereto. In such case the salvage from the track could be sold by the owner and the proceeds retained, including amounts derived from

the sale of replacements made by appellant and some of the cost of which, if appellant owned the track, would have gone into its capital account.

Under Illinois law appellant has the right to condemn private property for its common carrier purposes (Ill. Rev. Stat. 1937, Ch. 114, Sec. 18), but it could not have condemned a right of way for the track here involved, even if it had wished to construct the track. In *Limits Industrial R. Co.* v. *American, etc. Works,* 321 Ill. 101, there was involved a petition for the condemnation of a right of way for a switch track to connect the line of an existing terminal railroad with a proposed industrial district. The proposed track would have been about 730 feet in length, and similar in every way to the track here involved. It would have been subjected to precisely the same character of use, and the industries to be served thereby were as numerous as the industries served by the track here involved. Dealing with the right of a railroad company to condemn for such a purpose, the Supreme Court of Illinois said at page 107:

> "Clearly, a railroad company cannot condemn private property for a spur track for the purpose of connecting a particular plant or industry, or a small group of such, with the main line of its road for the private benefit of the plant or industry and of the railroad company. Such a use would not be a public use of the property but a private use for the private profit of the plants or industries affected and of the railroad company."

Following this statement of the law the court then pointed out, in support of its conclusion, that the location of the proposed track would be such that it would not be available to the public generally. The same situation prevails in the case at bar. The track involved is elevated from its connection with appellant's line to the north side of Hillock Street (R. 76) and for this distance could not be used by

any industry. From there on, it lies entirely upon property owned by the appellee industries, except where it crosses two streets at grade; and is immediately north of Cologne Street, which certainly is not available for industrial development. (See Pet. Ex. 1, R. 58). Even the spurs serving the appellee industries could not be extended to serve others, as the property of the appellee industries occupies all of the space between Cologne Street and the Chicago River. If appellant could not have condemned right of way for this track, it is difficult to see how it qualifies as public track open to use by the public.

The fact is that this track is private, both in law and in fact. Legally, it might never be available for use by anyone other than the appellee industries, due to the inability of any other industry to meet the requirements of the statute, and the intervening rights of the owner. Actually, the physical situation is such that the track is not available to additional industries and cannot be made so available.

The distinction between public and private switch tracks, and the resulting differences in the obligations of the railroads with which they connect, has been recognized by this Court. In *Union Lime Co.* v. *C. & N. W. R. Co.*, 233 U. S. 211, this Court said at page 222:

> "There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings."

This statement was quoted with approval in *C. & N. W. R. Co.* v. *Ochs*, 249 U. S. 416, 420. The track here involved is not of the character involved in *Hairston* v. *D. & W. R. Co.*, 208 U. S. 598, where it appeared (p. 608) that the track to be constructed would not only serve one industry, but would be available as a general team track for the receipt and delivery of freight to all others.

It is not like the track involved in *Union Lime Co.* v. *C.*

& N. W. R. Co., 233 U. S. 211; *C. & N. W. R. Co.* v. *Ochs*, 249 U. S. 416; *L. E. & W. R. Co.* v. *Commission*, 249 U. S. 422, and *W. & A. R. Co.* v. *Commission*, 267 U. S. 493. In all those cases the track involved was owned or to be owned by the railroad, and was located or to be located on railroad right of way and actually open to use by the public generally. None of these things are true of the track involved in the case at bar.

The question thus presented is of substantial importance. A taking of property for private use cannot be justified even though there be compensation for such taking. In *Missouri Pacific Railroad Co.* v. *Nebraska*, 164 U. S. 403, this Court said at page 417:

> "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

On this point see also *Hairston* v. *D. & W. R. Co.*, 208 U. S. 598, 605; *Great Northern Railroad Co.* v. *Cahill*, 253 U. S. 71, 77; *C. St. P., M. & O. R. Co.* v. *Holmberg*, 282 U. S. 162, 167; *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 80.

Also, the nature of the use to which this track is subjected is essentially a judicial question to be decided by this Court, even though the Commission and the lower courts have said the track is public. In *Hairston* v. *D. & W. R. Co.*, 208 U. S. 598, this Court, while recognizing that great respect should be accorded the judgments of state courts upon what should be deemed public uses in such states, nevertheless said at page 606:

> "The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."

To the same effect is *Rindge Co.* v. *Los Angeles*, 262 U.

S. 700, where this Court, while again recognizing the respect to be accorded the judgment of the courts of the state involved, nevertheless said at page 705:

> "The nature of a use, whether public or private, is ultimately a judicial question."

In *Cincinnati* v. *Vester*, 281 U. S. 439, this principle of law was again stated. This Court, at page 446, stated that the question of what is a public use is a judicial one, and adverting to the respect to be accorded the decision of local courts, again said,

> "But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

All of the circumstances which we have enumerated are inconsistent with any theory that the track is public and that the general public has any interest in it or in its maintenance. The law and the facts demonstrate that any amounts spent by appellant in maintaining the track will be expended for the private use and benefit of the appellee industries. The order of the Commission thus unquestionably takes the property of appellant for the private use of others, and is, therefore, a taking without due process of law, in violation of appellant's rights under the Fourteenth Amendment to the Federal Constitution.

3. So far as we know, there is no judicial decision dealing with the exact question here presented. It is natural to assume that this lack of direct ruling is due to the fact that it has never before been claimed that the public obligations of a railroad require it to maintain track not constructed or owned by it, not on its right of way, and devoted to a private use. There are, however, a number of decisions dealing with various phases of the situation now presented. All of those decisions compel the conclusion that the requirement of the Commission's order cannot be sustained.

In *Union Lime Co.* v. *C. & N. W. R. Co.*, 233 U. S. 211, the proceeding was one by the railroad company to condemn land for a spur track, the construction of which had been ordered by the Railroad Commission of Wisconsin under authority of a Wisconsin statute. The condemnation was resisted on the ground that the land was to be taken for a private and not a public use. This Court accepted the finding of the state court that the track, when constructed, would be a public track (pp. 220, 221), and upheld the right of the railroad to condemn, saying at page 222:

> "There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings."

In *C. & N. W. R. Co.* v. *Ochs*, 249 U. S. 416, the facts were that the Minnesota Railroad Commission had made an order requiring the railroad to alter and extend a side track already in existence and serving an industry, the order being made under authority of state statute which authorized the Commission to make a reasonable apportionment of the cost of the work. The track had been maintained and operated by the railroad for some years, which was free to use it for purposes other than serving the industry and had done so occasionally. This Court sustained the order, saying at page 419:

> "Under the settled rule in Minnesota a side track such as is in question here is not merely a private siding, but 'additional trackage for public use.' If need be, the right of way for it may be acquired by condemnation. It becomes the property of the railroad company and an integral part of its railroad system, and is wholly under its control. Besides enabling the public to get the products of the industry served, it is at the service of all who have occasion to use it, and must be operated accordingly."

Speaking of a carrier's duty to discharge obligations inherent in its business, this Court said at page 421:

> "To do this requires an expenditure of money, of course, but the expenditure is for property which will belong to the company and be employed in its business. The money is not taken from the company and given to others * * *."

This Court quoted with approval (p. 420) the statement made by it in the *Union Lime Company* case, *supra*, with respect to the distinction between spurs owned and operated by common carriers, and private sidings, and recognizing that the spur track was for a public and not a private use, approved the distribution of cost prescribed by the order.

In *L. E. & W. R. Co.* v. *Commission*, 249 U. S. 422, there was involved an order of the Public Utilities Commission of Illinois requiring the railroad company to restore a side track maintained and operated on its right of way for twenty-five years and which had been removed by it. In this case also, the public character of the track was apparent. This Court, considering some of the Illinois cases which we have cited herein, said at page 424:

> "Under the laws of the state the side track before its removal, although used principally in moving freight from and to Cameron's elevator and coal yard, was open to use by the public and subject to public control like other parts of the company's road; in other words, it was a track which the state impressed with a public character."

This conclusion was reached because of the fact that the track involved was actually part of the railroad, for it was to be constructed entirely upon the railroad right of way, and as stated by this Court at page 425:

> "When the track is restored the company will own it and be entitled to make a reasonable charge for its use, just as is the case with other property employed in the company's transportation service."

In *W. & A. R. Co.* v. *Commission*, 267 U. S. 493, there was involved an order of the Georgia Public Service Com-

mission requiring the railroad to furnish switching service on an industrial siding to an industry in Atlanta, Georgia. The track was entirely upon the railroad right of way, was presumably built and owned by the railroad and had been used for many years in the service of industries. Citing *Union Lime Co.* v. *C. & N. W. R. Co.*, 233 U. S. 211, this Court held (p. 496) that the spur track was for a public purpose, and sustained the order; overruling the contention that since the service on the spur was supplied at a loss to the railroad, there was a confiscation of its property (pp. 496, 497).

In *Jones* v. *Newport etc. Co.*, 65 Fed. 736 (6th Cir.), the case arose out of the discontinuance by the railroad of a side track which had been operated for many years for the purpose of serving the plaintiff. A specific allegation of the complaint was (p. 737) that by virtue of the long continued operation, the switch track became a part of the main line of the defendant's road. The Court of Appeals, through Judge Taft, later Chief Justice of this Court, rejected this claim, saying at page 740:

> "We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it."

The court then referred to several cases decided by the Illinois courts, and referring to the decision in *C. & A. R. Co.* v. *Suffern*, 129 Ill. 274, said:

> "But this is very far from holding that there is any common law liability to maintain a side track forever after it has once been established."

The rule thus established was approved and followed in *Brown* v. *Southern R. Co.*, 187 Fed. 481, 485. In *Norfolk etc. Co.* v. *Norfolk etc. R. Co.*, 195 S. E. (Va.) 684, the action was to recover expenditures made by the plaintiff in

connection with certain tracks owned and operated by it. The Court said at page 687:

> "We have seen that this plaintiff has kept up its own tracks and its own yard and has done so at considerable expense to itself. This is as it should be. A man who shingles his own house must pay for it."

In *Aileen Mills* v. *Norfolk etc. R. Co.*, 140 S. E. (N. Car.) 306, the controversy was between the railroad and an industry as to which party should make certain necessary repairs on a side track serving the industry. The track was partly on the railroad right of way and partly on property of the industry. The opinion does not say who constructed it and owned it. The industry finally made the repairs and sued the railroad to recover the amount thus expended. After stating that the track involved was not constructed pursuant to an order of the Corporation Commission of North Carolina, as it might have been under the statute (p. 306), the Court said at page 307:

> "In the absence of a contract by which defendant was obligated to maintain said side track and trestle, or of an order of the Corporation Commission made under legislative authority, defendant cannot be held liable to plaintiff for the cost of making repairs, although necessary, upon the side track or trestle located on plaintiff's property, and used exclusively for plaintiff's benefit."

It will be observed that in the foregoing case, the question arose as to whether the track had been constructed by the railroad pursuant to an order of the Corporation Commission of North Carolina. Had the track been so constructed, it presumably would then have been owned by the railroad and constituted part of its facilities devoted to public use. The absence of such construction and ownership and devotion to public use was apparently the ground of the Court's decision.

In *Lehigh Valley R. Co.* v. *United Lead Co.*, 133 Atl. 290,

the suit was by the railroad to recover from the industry damages caused by the burning of cars while on side tracks serving the industry. The tracks were constructed under an agreement which protected the railroad company from damage arising from fire or other causes, and provided that the railroad should build the tracks and should own and maintain them during the life of the agreement. The Court denied the claim, finding that the agreement itself was illegal and that no recovery could be predicated thereon. Holding that the contract obligation of the railroad company to maintain the side tracks involved was one of the things making for the illegality of the entire contract, the Court said at page 292:

> "If the plaintiff is not obliged to reimburse the defendant for its expenditures in maintaining the sidings, which under the contract the plaintiff was obligated to maintain, then the defendant is not obligated to reimburse the plaintiff for the loss sustained by the burning of the cars."

It will be observed that each of the cases cited compel the conclusion that appellant cannot be required to expend its funds in the maintenance of the track here involved. In this case, we have none of the factors which were present in the cases in which obligations of railroads with respect to side tracks were sustained. In all those cases, the railroad ownership of the track involved; its status as part of the railroad; its public character; the complete railroad control of it, and the right of the railroad to condemn for the purpose of its construction, were the determining factors. None of these factors exist in the case at bar.

The question presented in this case more closely approximates that presented in *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196. In that case, acting under a statute of Nebraska, a grain association applied in writing for an elevator siding on the right of way of the railway, which application was refused. The association then notified the

railroad that it intended to build an elevator near the end of an existing side track of the railroad and would expect an extension of the track. Although the railroad company refused to give the trackage privilege, the elevator was built and a suit was then brought to recover the penalty imposed by the state statute. This Court held that since the statute made no provision for compensation to the railroad for its outlay in building and maintaining the required side track (p. 205), it could not be sustained. This Court further said at page 207:

> "But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, are private connections? We see no reason."

The requirement of Illinois law that railroads are only required to build connections on their rights of way to connect with track built by shippers, is similar to the requirement of Section 1, Paragraph 9, of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, Par. 9). With respect to this provision of the Federal Act, the Interstate Commerce Commission, in *Winters etc. Co.* v. *C. M. & St. P. Ry. Co.*, 16 I. C. C. 587, said at page 589:

> "By Section 1 of the amended act to regulate commerce the Commission is authorized to order the construction and maintenance, upon reasonable terms, of 'a switch connection' with any lateral branch line of railroad, or 'private side track *which may be constructed* to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same.' From the language of this section it is clear that the Commission has no authority to order the construction of a *private side track* by a railroad company, but that its authority is limited to ordering a carrier to make 'a switch connection' *with* a private side track. Certainly our authority does not embrace the power to order a carrier to construct and maintain a side track off

its right of way and without direct contribution by the shipper to the expense incident thereto."

The foregoing construction of the Federal Act was approved by this Court in *C. C. C. & St. L. R. Co.* v. *U. S.*, 275 U. S. 404, where the *Winters case, supra,* was cited by this Court with approval. The Commission has itself held in a case similar to the case at bar, that a railroad should not maintain track not owned by it and not on its property. In the Commission's Docket No. 15742, *In the Matter of the Petition of the C. C. C. & St. L. Ry. Co.*, 6 Illinois Com. Com. Rep. 967, the railroad had filed a petition complaining of the refusal of an industry to maintain the switch track serving it. The Commission found that the uniform practice in Illinois was for industries to maintain their own tracks; that a contrary ruling in the case before it would create a discrimination, and said:

"The Commission believes under all the facts and circumstances that the petitioner railway company should not be allowed to maintain the track in question under discriminatory circumstances as related to other industries not only on its own line but on the line of other railroads."

All of the foregoing decisions support the conclusion that appellant should not be required to maintain the track here involved, for the reasons that appellant did not construct and does not own the track; it is not constructed on appellant's property; it is not a public track; appellant does not have complete control over it, and had no legal right to condemn a right of way for it. This view of the requirement of the Commission's order is also supported by reason. As said by the Supreme Court of Virginia in *Norfolk etc. Co.* v. *Norfolk etc. R. Co.*, 195 S. E. 684, 687:

"A man who shingles his house must pay for it."

4. It will doubtless be argued that appellant receives large profits from the operation of the entire track here involved, and that this circumstance justifies the order of

the Commission. The fact, however, is not proven by the evidence. The testimony was that in 1934 appellant received approximately $40,000 in gross revenue from traffic moving over the track to and from the appellee industries. How much of this represents profit above costs of maintenance and operation is not shown and could not be shown (R. 80). But in any case, the point is unimportant.

Appellant is not necessarily seeking abandonment of service over the track, although its petition, as required by the Illinois statute, requests that relief. Without regard to whether the operation of this individual piece of track is or is not profitable, appellant is willing to continue that operation if it is relieved of the burden of maintaining the track and of making the payments required by the City of Chicago. For this reason its petition to the Commission was not founded upon the theory that the operation was unprofitable, although it may be so.

The record shows that most of the revenue received by appellant on traffic hauled over this track is switching revenue, appellant supplying a terminal facility for the benefits of other railroads who receive the line haul to Chicago (R. 93, 94). Nor does appellant receive any revenue which can be particularly assigned to this track. The rates to and from the appellee industries are the Chicago rates which apply to and from all industries in the Chicago switching district (R. 83, 84). These rates remain the same whether or not the appellee industries receive service over this track. The rates on traffic to and from these industries can be cancelled merely by eliminating the industries from the directory of industries (R. 84).

It is clear that the order of the Commission cannot be sustained on any theory of profit to appellant. It does not appear that there is any such profit. And any profit

which appellant may derive from operation over the track does not affect or relate to the determination of the questions presented for decision. Whether or not there is a return to appellant, it may not be deprived of its property for the benefit and use of private parties, and may not be required to enter into undertakings not within its agreement to serve the public.

In any case, the service which the appellee industries insist is so necessary to their continued existence will be available to them, even if appellant is relieved of the obligations imposed upon it by the Commission's order; always assuming, of course, that the service is of sufficient value to those industries to warrant them in making the expenditures which appellant is now required to make. The Gas Company announced its willingness to participate in the cost of maintaining the track, if it develops that appellant is not required to sustain that burden (R. 87). So far as the distribution of those expenditures is concerned, the Gas Company, which is presumably the owner of the piece of track here involved, is at liberty to make such voluntary arrangements as it wishes with the other appellee industries; and in the event of a disagreement the Commission has ample authority under the Illinois statute to deal with the matter (Ill. Rev. Stat. 1937, Ch. 111 2/3, Sec. 45, 49 (a)).

Conclusion.

The question presented for decision herein is of major importance. The continuing expense imposed upon appellant by the order involved is substantial. As appears from the Commission's decision in its Docket 15742, *Petition of C. C. C. & St. L. Ry. Co.*, 6 Ill. Com. Com. Rep. 967, the uniform practice of railroads in Illinois has been to require industries to maintain their own tracks. And so

far as appears from the decisions, this has been the practice elsewhere.

If the decision of the lower court is upheld, all this will be changed. A large additional expense will be cast upon railroads generally. They will be required to expend their funds in the improvement of property belonging to others. They will be required to assume burdens not incident to their engagement to serve the public, and which they have never before been required to assume.

We submit that this cannot be the law. Justice and equity require that the decision of the lower court be reversed, and that the Commission's order be set aside.

Respectfully submitted,

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APPENDIX.

Section 45 of Chapter 111⅔, Illinois Revised Statutes, 1937.

"SEC. 45. Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover; *Provided,* that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.

Side Track Connections.

"Under the conditions specified in the above proviso every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby.

"Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that application has been made by any corporation or person to a railroad company for a connection or spur as provided in

this section, and that the railroad company has refused to provide such connection or spur, and that the applicant is entitled to have the same provided for him, the commission shall make an order requiring the providing of such connection or spur and the maintenance and use of the same upon reasonable terms which the commission shall have the power to prescribe. Whenever any such connection or spur has been so provided, any corporation or person shall be entitled to connect with the track, tracks or railroad thereby connected with the railroad of the railroad company, and to use the same or to use the spur so provided upon payment to the party or parties incurring the primary expenses of such track, tracks or railroad, or the connection therewith or of such spur, of a reasonable proportion of the cost thereof to be determined by the commission after notice to the interested parties and a hearing thereon: *Provided*, that such connection and use can be made without unreasonable interference with the rights of the party or parties incurring such primary expense. The commission shall likewise have the power to require one railroad company to switch to private spurs and industrial tracks upon its own railroad the cars of a connecting railroad company and to prescribe the terms and compensation for such service."